(2) 96-1423

No.

FILED
APR 10 1997
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

KAREN DEVINE,
*Petitioner,*

v.

STONE, LEYTON & GERSHMAN,
A Professional Corporation
*Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether shareholder-directors of a professional corporation who own, control and manage the professional corporation and who share in its profits and losses are "employees" rather than "employers" for purposes of Title VII of the Civil Rights Act of 1964?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | iii |
| Table of Authorities | iv |
| Statement of the Case | 1 |
| Reasons for Denying the Writ | 3 |
| I. All Circuits Consider the Economic Realities of the Employment Relationship | 3 |
| II There Is No "Tension" Between the Eighth Circuit's Decision Below and *Walters v. Metropolitan Education Enterprises, Inc.* | 8 |
| Conclusion | 9 |

## TABLE OF AUTHORITIES

Page(s)

**Cases:**

*Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) ..... 3

*EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) ..... 4

*EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996) ..... 4,5,6

*Fountain v. Metcalf, Zima & Company, P.A.*, 925 F.2d 1398 (11th Cir. 1991) ..... 4,5

*Hishon v. King & Spalding*, 467 U.S. 69 (1984) ..... 3

*Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986) ..... 3,4,5

*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) ..... 8

*Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996) ..... 3

*Vick v. Foote, Inc.*, 898 F.Supp. 330 (E.D. Va. 1995), *aff'd*, 82 F.3d 411 (4th Cir.), *cert. denied*, 117 S.Ct. 311 (1996) ..... 6

*Walters v. Metropolitan Educational Enterprises, Inc.*, 65 U.S.L.W. 4059 (U.S. Jan. 14, 1997) ..... 3,8

*Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 108 S.Ct. 503 (1987) ..... 3

**Statutes**:

42 U.S.C. § 2000e(b) ..... 2,8

**Secondary Sources:**

EEOC Compl. Man. (CCH), App. 605-e, § 2179, 2337 ..... 7

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Stone, Leyton & Gershman, A Professional Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's grant of summary judgment to Respondent. The opinion of the Court of Appeals is reported at 100 F.3d 78.

## STATEMENT OF THE CASE

Respondent Stone, Leyton & Gershman, A Professional Corporation, is a law firm which converted from a general partnership to a Missouri professional corporation effective January 1, 1993, at which time all of Respondent's former partners became shareholders and directors of the firm.

Respondent hired Petitioner Karen Devine as a paralegal in September, 1991 and terminated her employment on May 20, 1994. Following her termination, Petitioner filed a Complaint against Respondent in the United States District Court for the Eastern District of Missouri alleging sex discrimination and retaliatory discharge claims under both Title VII of the Civil Rights Act of 1964 and the Missouri Human Rights Act ("MHRA").

Respondent moved for summary judgment asserting that Respondent never employed the requisite fifteen or more employees necessary to trigger Title VII jurisdiction. Respondent also moved to dismiss Petitioner's claims brought under the MHRA for lack of supplemental jurisdiction.

Based on two affidavits filed by Respondent and a counter-affidavit submitted by Petitioner, the district court, the Honorable Carol Jackson, granted Respondent's motion for summary judgment. The district court found that the jurisdictional threshold of 15 employees could be met only if the shareholder-

directors of Respondent were considered "employees" under Title VII. The district court stated that "in determining whether an individual is an employee for purposes of Title VII, 42 U.S.C. § 2000e(b), courts consider the economic realities of the employment situation." Appendix to Petition for Writ of Certiorari (hereinafter "App.") at A-11.

> In the present case, Defendant's shareholders-directors have continued to perform as they did as partners. The shareholders/directors have continued to exclusively own, manage and control the firm in the same manner as when it was a partnership. The shareholders/directors make capital contributions; guarantee repayment of loans; allocate compensation among the shareholders based upon the firm's profits; allocate and supervise the firm's legal work; and participate in all management decisions. Based on these economic realities, it is clear that the role of defendant's shareholders/directors is analogous to that of partners. Therefore, the shareholders/directors are not "employees" for purposes of 42 U.S.C. §2000e(b).

*Id.* (citations omitted).

The Eighth Circuit, in an opinion by Judge Diana Murphy, affirmed in light of the "uncontroverted evidence that the shareholder-directors participated in all management decisions and set firm policy, as well as evidence showing indicia of ownership such as contributions to firm capital and responsibility for firm debts." App. at A-7.

## REASONS FOR DENYING THE WRIT

Petitioner argues that her Petition should be granted because there is a conflict between the Second Circuit and other circuits regarding the definition of "employee" under the federal antidiscrimination statutes. However, analysis of the cases cited by Petitioner, including a very recent decision of the Second Circuit, demonstrates that the asserted conflict merely is one of emphasis and not result. All courts of appeals, including the Second Circuit, look to the facts and circumstances of the employment relationship in determining whether an individual is an "employee" or an "employer" under the federal antidiscrimination statutes. There is no substantive conflict for this Court to resolve. Moreover, the opinion below is consistent with this Court's recent opinion in *Walters v. Metropolitan Educational Enterprises, Inc.*, 65 U.S.L.W. 4059 (U.S. Jan. 14, 1997).

### I. All Circuits Consider The Economic Realities Of The Employment Relationship

In examining the Title VII status of partners in professional partnerships, the courts of appeals have consistently applied an "economic realities" test. *E.g.*, *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 867-868 (9th Cir. 1996); *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 108 S.Ct. 503 (1987); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 797 (2d Cir. 1986); *Burke v. Friedman*, 556 F.2d 867, 869-870 (7th Cir. 1977). *Accord Hishon v. King & Spalding*, 467 U.S. 69, 79-80 (1984) (J. Powell, concurring). Under these cases, if the partners in fact own, manage and control the business and share in the profits and losses, they are regarded as employers rather than employees for purposes of the antidiscrimination statutes. *E.g.*, *Burke*, 556 F.2d at 869.

Most courts of appeals that have considered whether members of professional corporations are "employers" or "employees" for purposes of the federal antidiscrimination statutes have

examined whether the role of the member of the professional corporation is analogous to that of a partner in a partnership. *E.g.*, *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984) ("role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation"). The partnership analogy is merely shorthand for a multi-factor inquiry that considers an individual's managerial responsibility, financial risk, and the other indicia of ownership and control that normally distinguish employers from employees. *See Fountain v. Metcalf, Zima & Company, P.A.*, 925 F.2d 1398, 1400-1401 (11th Cir. 1991) ("we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership").

Although the Second Circuit has resisted the partnership analogy, it conducts similar multi-factor inquiries to determine an individual's status as employer or employee. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538-1540 (2d Cir. 1996). In an earlier case, *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986), the Second Circuit reversed a district court holding that a member of a professional corporation should be deemed an employer rather than employee because the professional corporation was actually managed and operated like a partnership. In *Hyland*, the Second Circuit objected to equating a member of a corporation to a member of a partnership and held "that the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership." *Id.* at 798.

In reaching this conclusion, however, the *Hyland* court did not ignore the economic realities. It conceded that "those who own shares in a corporation may or may not be employees." *Id.* In concluding that Dr. Hyland was an employee, the Second Circuit did not end its analysis merely because Dr. Hyland was associ-

ated with a corporation. Rather, the Second Circuit emphasized that Dr. Hyland "was specifically designated as an employee of the corporation in an employment agreement containing detailed provisions relating to the terms and conditions of his employment." *Id.* Nevertheless, the dissent in *Hyland* characterized the majority's opinion as holding that Hyland was an employee for purposes of the Age Discrimination in Employment Act ("ADEA") "merely because he worked for [a] corporation." *Id.* Some courts and litigants, including the parties below, have assumed that the dissent's broad reading of *Hyland* was correct. *But see Fountain*, 925 F.2d at 1401 (distinguishing *Hyland* on the grounds that Second Circuit noted that Hyland had signed a two-year renewable employment agreement and received $60,000 annual salary from which tax was withheld).

In its recent opinion in *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), however, which was decided after the briefing in this case below, the Second Circuit clarified its holding in *Hyland* and applied a fact-specific test to determine whether directors of an insurance brokerage and employee benefit consulting firm were "employees" for purposes of the ADEA. In concluding that they were employees, the Second Circuit did not rely simply on the fact that these directors worked full-time for the corporation. It specifically noted:

> While the Court in *Hyland* held that status as a corporate director/shareholder and status as a partner are "mutually exclusive" for purposes of exemption from the ADEA, it did not imply, much less hold, that all directors must be viewed as employees. Directors who do not possess the common law indicia of employment are clearly not "employees." Thus the *Hyland* court looked to the director's role in the company to determine whether there existed an employment relationship in addition to the role of director.

*Id.* at 1539. In determining whether a director is an employee for purposes of the antidiscrimination statutes, the Second Circuit in

*Johnson & Higgins* advocated consideration of such factors as whether the director has undertaken traditional employee duties and whether the director reports to someone higher in the hierarchy. *Id.* Thus, *Johnson & Higgins* refutes Petitioner's assertion that the Second Circuit treats shareholder-directors "as 'employees' for purposes of the antidiscrimination laws, regardless of the nature of their duties." Petition at 6.

The distinction in approach between the Second Circuit on the one hand, and the Seventh, Eighth and Eleventh Circuits on the other, is more one of how the inquiry is characterized than of how it is conducted. For example, if confronted with the same facts as the Eighth Circuit below, it unlikely that the Second Circuit would decide this case differently than did the Eighth Circuit. Unlike the *Johnson & Higgins* directors, Respondent's shareholder-directors do not report to a senior management committee.

It is now clear that all the courts of appeals examine the underlying economic reality of the individual's relationship to the corporate entity. *See also Vick v. Foote, Inc.*, 898 F.Supp. 330 (E.D. Va. 1995) (economic reality is that Vice President and 60% shareholder is owner and not employee of corporation), *aff'd*, 82 F.3d 411 (4th Cir.), *cert. denied*, 117 S.Ct. 311 (1996). This economic realities test is based upon the fundamental premise that "the substance of the employment relationship determines whether an individual is an employee under Title VII." App. A-4 to A-5 (citations omitted). As evidenced by its Compliance Manual, this view is shared by the Equal Employment Opportunity Commission, regardless of the type of entity that is involved:

> When the EOS is confronted with a charge raising the issue of whether individuals who are partners, officers, members of boards of directors, or major shareholders in organizations should be considered employees, *the EOS should investigate the charge by looking at the substance of*

> *the work relationship, rather than its form or label.* The existence of employee status for an individual must turn on the facts of each case. *Consideration is given to all the factors of the work relationship and no one factor is determinative.*

EEOC Compl. Man. (CCH), App. 605-e, § 2179, 2337 (emphasis added).

In sum, there are not "two inconsistent methods for determining whether a person employed by a professional corporation should be treated as an 'employee' of the corporation." Petition at 5. There is consistent application of an economic realities test, with some variation in how the test is articulated. This consistency among the circuits in applying some form of the economic realities test is an acknowledgment that classifying individuals as "employers" or "employees" based solely on the legal form of the entity with which they are associated would make jurisdiction under the antidiscrimination statutes subject to artifice and labels. Variations in the factors that courts emphasize in different factual contexts or in the analogies they find useful in weighing those factors do not create a conflict worthy of this Court's review. As the appellate courts continue to address new, hybrid business entities that combine the limited liability of a corporation and the management characteristics of a partnership, true conflicts in how similar entities are treated under the antidiscrimination laws may arise. If and when they arise, the Court will have a more meaningful context to provide guidance to the lower courts than it is presented with in this case.

## II. There Is No "Tension" Between the Eighth Circuit's Decision Below and *Walters v. Metropolitan Education Enterprises, Inc.*

The result below is completely consistent with this Court's decision in *Walters v. Metropolitan Educational Enterprises, Inc.*, 65 U.S.L.W. 4059 (U.S. Jan. 14, 1997). Petitioner's contention that *Walters* "stands in considerable tension" with the holding below in this case is puzzling, given that this Court in *Walters* did not consider any substantive employer/employee issues under Title VII. Petition at 7. In *Walters*, this Court addressed the question whether certain part-time workers, conceded by both sides to be "employees," should be counted under Title VII toward the 15-employee jurisdictional threshold. The specific issue was one of statutory construction: whether a corporation "has" a part-time employee on his or her days off under Title VII, 42 U.S.C. §2000e(b). This Court did not conclude, as suggested by Petitioner, that the appropriate interpretation of this language was that interpretation which was easiest to administer. This Court in *Walters* merely noted that the "practical" approach urged by one of the parties in that case was not very practical in application. *Id.* at 7. Even if ease of administration were relevant, the economic realities test, as the present case demonstrates, has not proven difficult to administer and is far less complicated than the factual inquiries which this Court has endorsed in other contexts. *E.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (employing a 12-part test to determine independent contractors/employee status under ERISA).

## CONCLUSION

There is no conflict among the circuits warranting review by this Court, nor is the opinion below inconsistent with prior decisions of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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